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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 19.....

No. 899.

THE KANSAS TURNPIKE AUTHORITY,
Petitioner,

vs.

EDWIN JOHN ABRAMSON and EMMETT JOHNS,
Executors of the Estate of JOHN P. ABRAMSON,
Deceased, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Deceased, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by the Kansas Turnpike Authority for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered in the above entitled cause, and which affirmed the judgment of the United States District Court for the District of Kansas.

OPINION BELOW.

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit (see C.C.A. Transcript or App. A1)* is not yet officially reported. This cause was originally tried to the District Judge (Hon. W. W. Ritter of Utah) without a jury and no opinion was written. The District Judge refused to make any Findings of Fact (R. 56)*, but did make a Conclusion of Law (R. 16 and App. A10).

JURISDICTION.

The judgment of the United States Court of Appeals for the Tenth Circuit was rendered, filed and entered on February 29, 1960 (App. A1). The jurisdiction of the Supreme Court of the United States is invoked by virtue of Section 1254 of Title 28 of the United States Code (62 Stat. 928), and this petition is filed within the time provided in Section 2101(c) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

Broadly stated, there are just two questions involved in the presentation of this petition:

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*Citations preceded by the letters "App." refer to the Appendix attached to this Petition.

*Citations preceded by the letter "R" refer to the certified transcript of proceedings in the Tenth Circuit Court of Appeals.

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I.

Is There Diversity Jurisdiction in the Federal Courts under the Eleventh Amendment to the Constitution of the United States over State Governmental Agencies Carrying on Essential Governmental Functions Such As Does the Kansas Turnpike Authority—and (Although Not Here Directly Involved) Such As Does the State Highway Commission of Kansas, the State Board of Regents, the State National Guard Armory Board, and the State Office Building Commission, etc.?

II.

Can the Contract Between Contractor-Respondent and This Petitioner Be So Construed As a Matter of Law to Permit the Contractor to Recover from This Petitioner, the Kansas Turnpike Authority, for Reworking and Recompacting a Road Grade Damaged by Climatic Effects Prior to the Authority's Acceptance of the Work When Such Written Acceptance Is Specifically Required by the Contract?

STATE (KANSAS) STATUTES INVOLVED.

Several Kansas Statutes may be helpful in consideration of the question of diversity jurisdiction. These several statutes are listed and their nature briefly stated in the Index (*supra*); and their pertinent parts are set forth in Appendix B (App. A11).

STATEMENT.

The Kansas Turnpike Authority, Appellant-Defendant in the Court below (hereafter referred to as Petitioner), was created as an instrumentality and governmental de-

partment of the State of Kansas by the State Legislature of 1953. Contracts for constructing this 234-mile superhighway were let in 1954-1955 and it was completed and opened to traffic in October, 1956. The Plaintiff-Appellee (hereafter referred to as Respondent) is a contractor from Des Moines, Iowa, who was awarded Contract No. 5-18-E(1) to do 6.91 miles of grading and drainage work (to make ready for laying of pavement) on the Kansas Turnpike.

The contract becomes a rather voluminous document since it includes the Standard Specifications, Supplemental Specifications, and Special Provisions, etc. (R. 57-66, 85-93).

Respondent contractor was paid for his work under this contract except for his claim for extra compensation for recompaction of the road grade which he had to recompact because compaction was lost during a rainy period.

The principal question here involved is one of diversity jurisdiction. The only other question is whether, under the terms of the contract provisions, the Respondent contractor was entitled to be paid for compaction work required to be redone because rains and inclement weather destroyed the first compaction prior to the time it had been accepted as per the official written "Notice of Acceptance" (R. 83-85).

The Respondent contractor was a resident and citizen of the State of Iowa and the amount in controversy exceeded $10,000.00. During the trial in the District Court this petitioner attempted to point out to the District Judge that the Kansas Turnpike Authority was in fact the State of Kansas (R. 43); a Motion to Dismiss for lack of diversity jurisdiction was filed (R. 14, 51) at the conclusion of the evidence; and the question again raised in No. V of Re-

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quested Conclusions of Law (R. 15), which the Trial Judge refused to consider (R. 56).

If the Respondent is entitled to any judgment at all, there is no question as to the amount in judgment rendered by the Trial Court (R. 16). The Tenth Circuit Court of Appeals affirmed the judgment of the Trial Court and, in doing so, held:

> "(1) That the Kansas Turnpike Authority is vested with the power to sue and be sued in its own name, and the State of Kansas is in no wise interested in judgments for or against it; that the State of Kansas was therefore not a real party in interest and the requisite diversity of citizenship is present.*
>
> "(2) That the rains which destroyed the original compaction were 'unusual' rains.* (Second paragraph of Opinion Below).

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*But also, the State Highway Commission of Kansas is vested with the power to sue and be sued in its own name. As was held in *Wyoming State Highway Commission* v. *Utah Construction Company*, 278 U.S. 194, 73 L. Ed. 262, the Wyoming State Highway Commission was empowered to sue and be sued in its own name and diversity jurisdiction was denied. Kansas, as a state, has a major interest in the Kansas Turnpike—the State itself owns all the right-of-way—the Turnpike is policed by the State Police—and when the Turnpike bonds are paid off, the revenues revert to the State for use on the State system of highways.

*This is a finding upon a question of fact made in the first instance by the Circuit Court. The District Court refused to make Findings of Fact and instead determined Respondent's right to recover as a matter of law upon the Trial Court's interpretation of the contract.

"(3) In each instance save one, viz., Section 9.2, the duty to repair or recompact was contingent upon the negligence or fault of the contractor."**

The opinion, ruling and decision of the Tenth Circuit Court of Appeals, as Petitioner's argument will show, attempted to make a finding of fact that seven inches of rain over a 15-day period (and never over 1.41 inches on any one day) constituted "unusual rains" such as would amount to "an act of God" under Section 7.14 of the Contract Specifications (R. 90-91). The District Court had previously refused to make any findings of fact and had decided the case solely upon a question of law construing the contract.

It seems to this Petitioner that the Circuit Court also, as did the Trial Court, completely ignored important provisions of the Contract Specifications in upholding the Trial Court's legal construction of the contract instrument.

The Circuit Court of Appeals upheld diversity jurisdiction over this Petitioner who, as the ensuing argument will show, was in fact "the State of Kansas" and was therefore not a citizen within the meaning of Section 1332 of Title 28 of the United States Code (App. A17). In addition to the questions here presented, there are other serious matters involved. More and more Turnpike Authorities or Commissions are being created by State Legislatures (but each may differ in its relationship to the state) and

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**Here the Circuit Court, as did the Trial Court, completely ignored Contract Specification Section No. 5 of Special Provisions (R. 60-61), Section 5.12 (R. 89), Section 9.2 (R. 92), and Section 18.20 (R. 93), all of which clearly state the contractor is responsible for maintaining his grade until final acceptance (and admittedly it was not finally accepted), and is responsible for work becoming defective for *any cause* including ordinary rains or climatic effects.

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particularly the question of diversity jurisdiction will be of growing concern. The recent Sixth Circuit Court case of *Harrison Construction Company* v. *Ohio Turnpike Commission*, 272 F.2d 337 (discussed *post*), was not appealed, so this Petitioner is informed, only because it went to the Sixth Circuit Court of Appeals on an appeal by the contractor from a District Court order dismissing the action for lack of diversity jurisdiction; and that case is now back in the District Court for trial on the merits. This Petitioner, therefore, respectfully suggests that the question of this action against the Kansas Turnpike Authority, being one against the State of Kansas for purpose of federal jurisdiction, is of sufficient importance to justify a review by this Court.

ARGUMENT.

I.

Is There Diversity Jurisdiction in the Federal Courts under the Eleventh Amendment to the Constitution of the United States over State Governmental Agencies Carrying on Essential Governmental Functions Such As Does the Kansas Turnpike Authority—and (Although Not Here Directly Involved) Such As Does the State Highway Commission of Kansas, the State Board of Regents, the State National Guard Armory Board, and the State Office Building Commission, etc.?

The fundamental error in the ruling by the Court of Appeals upon this question lies in (a) its attempt to distinguish this case from *State Highway Commission of Wyoming* v. *Utah Construction Company*, (Tenth C.C.A.) 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262; (b) its attempt to favorably compare this instant case with and to follow

the recent (December 3, 1959) Sixth Circuit Court case of *Harrison Construction Company* v. *Ohio Turnpike Commission*, 272 F.2d 337; (c) its apparent effort to distinguish between the Kansas Turnpike Authority as a governmental instrumentality created to carry on essential governmental functions and other similar governmental agencies created for similar purposes, such as the State Highway Commission of Kansas, etc.; and (d) its misunderstanding as to the relationship between the State of Kansas, as such, and the Kansas Turnpike Authority as an instrumentality and agency of state government.

In *Wyoming State Highway Commission* v. *Utah Construction Company, supra*, the Supreme Court of the United States clearly stated that the Wyoming Highway Commission is "the State" insofar as diversity jurisdiction under Section 1332, Title 28 of the United States Code and under the Eleventh Amendment to the Constitution of the United States (App. A17) are concerned. In the instant case, this Petitioner, the Kansas Turnpike Authority, is such a branch, instrumentality, agency and department of the "State of Kansas" that the State of Kansas is the real party in interest, just as would be the State Highway Commission of Kansas under similar circumstances—or just as was the Wyoming Highway Commission in the *Utah Construction Company* case, *supra*.

The United States District Court in Kansas, in *Stamey* v. *Kansas Highway Commission*, 76 F. Supp. 946, held that there was no jurisdiction in the Federal Courts against the Highway Commission of Kansas on construction contracts; and the same Court, in *Dunnuck* v. *Kansas Highway Commission*, 21 F. Supp. 882, held that the State Highway Commission of Kansas was immune from suits in the Federal Courts unless there was a clear waiver of such immunity and that there was no such waiver by a mere legislative

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provision that the Commission could sue and be sued. The United States District Court for the District of Kansas in these cases followed *Wyoming Highway Commission* v. *Utah Construction Company, supra,* in denying Federal diversity jurisdiction over the Kansas Highway Commission. Furthermore, the Supreme Court of Kansas said in *Anderson Cattle Company* v. *Kansas Turnpike Authority,* 180 Kan. 749, 308 P.2d 172:

> "* * * The Kansas Turnpike Authority is an arm or agency of the State of Kansas, created by the Legislature to perform an essential governmental function for the people of the State of Kansas (G.S. 1955 Supp., 68-2013); * * * But the State has not, by the Turnpike Act, given its general consent to be sued for all purposes. In this respect the Act is similar to the Act creating the Kansas Highway Commission."

By the above quoted language the Kansas Supreme Court has said the Kansas Turnpike Authority, like the Kansas Highway Commission (and, incidentally, like the Wyoming Highway Commission) partakes of and shares in the State's immunity against suit.

The Kansas Supreme Court, in *State ex rel.* v. *Kansas Turnpike Authority,* 176 Kan. 683, 692, 273 P.2d 198, said:

> "* * * We think it clear that the Legislature had power to create an arm of the State *other than* the State Highway Commission to construct a particular type of highway; that the proposed turnpike project is a part of a *state* system of highways." (Italics supplied).

Thus, the Kansas Supreme Court has held the Kansas Turnpike Authority (like the Kansas Highway Commission) to be an arm, instrumentality, agency and department of the State of Kansas so as to partake of the State's immunity against suit; and the Kansas Supreme Court has

clearly recognized that the Turnpike project is a part of the *state* system of highways.

The Supreme Court of Kansas again held in *American Mutual Insurance Company* v. *State Highway Commission*, 146 Kan. 239, 244, 69 P.2d 1091, that an action against the State Highway Commission is an action against the State of Kansas. See also *Payne* v. *State Highway Commission*, 136 Kan. 561, 566, 16 P.2d 509; and *Gresty* v. *Harry Darby, Director*, 146 Kan. 63, 66, 68 P.2d 649.

Respondent contended below and will contend here that Kansas Turnpike funds are not appropriated by the Legislature and are not disbursed by the State Treasurer and, therefore, cannot be "state funds" in which the State of Kansas is interested. Apparently the Circuit Court of Appeals held to that same view. However, the Supreme Court of Kansas has held otherwise with respect to state highway funds which are specially raised by collection of gasoline tax and specially earmarked for highway work and, hence, need not be appropriated by the Legislature—and the same would be true with respect to funds of the Kansas Turnpike Authority. In *State ex rel.* v. *State Highway Commission*, 139 Kan. 391, 32 P.2d 493, the Supreme Court of Kansas said:

> "They (Kansas Legislature) made no specific provision that the moneys so raised (from gasoline tax) and used should necessarily find their way into the State Treasury, but left the Legislature free to provide for the collection and disbursement of such funds in the way it deemed best. What the Legislature did was to provide that these moneys, as collected, should be transmitted to the state treasurer and by him placed in the highway fund and disbursed on proper orders by the highway commission (Laws of 1929, Chapter 255, Sections 17 and 18); since these funds are not required by the Constitution to find their way into the state

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treasury, and by statute do not do so, Section 24 of Article 2, requiring appropriation of moneys from the state treasury, has no application. These funds are collected for a specific purpose. The Legislature would have no authority to appropriate them for other purposes. They are collected, segregated, set aside, and can be used for one purpose only, namely, the construction and maintenance of state highways. This is not the only fund the state has, which, although deposited with the state treasurer and disbursed by him under proper directions of other officials, does not find its way into the state treasury, and therefore does not require specific appropriation every two years by the Legislature (*Lehnherr* v. *Feldman*, 110 Kan. 115, 120-122, 202 Pac. 844; *State ex rel.* v. *Thompson, Treasurer*, 115 Kan. 457, 461-462, 223 Pac. 258; *Kittredge* v. *Boyd*, 136 Kan. 691, 701, 18 P.2d 563)."

Thus, if the Federal Courts are going to hold that the Kansas Turnpike Authority is not "the State of Kansas" because the Legislature does not appropriate turnpike funds and because the State Treasurer does not disburse such funds, then it must also be held that the State Highway Commission of Kansas is not the State of Kansas for purpose of Federal diversity jurisdiction—and this would be contrary to decision already made by the Supreme Court of the United States and by the Kansas Supreme Court and by the United States District Courts for the District of Kansas in interpreting the Kansas law.

The Kansas Legislature created the Kansas Turnpike Authority as a body politic, constituted it a public instrumentality, and provided that its construction and operation of a Turnpike project was an essential governmental function (Section 68-2003, G.S., 1955 Supp. and 1957 Supp.). This same statute provides for seven members of the Kansas Turnpike Authority, four to be appointed by the Governor of Kansas, one to be the Director of the Kansas State

Highway Commission (also appointed by the Governor), and two State Legislators, *viz.*, the Chairman of the State Roads and Highways Committee and the Chairman of the House Roads and Highways Committee.

Like the Kansas State Highway Commission (Section 74-2001, G.S., 1949), the Kansas Turnpike Authority is created as a public body corporate with the power to sue and be sued (Section 68-2004, G.S, 1957 Supp.). That is to say, of course, that the Turnpike Authority may sue and be sued in a limited way and in such instances as the Legislature has waived state immunity. Like the Kansas State Highway Commission (Section 74-2002, G.S., 1949), the Kansas Turnpike Authority has its own seal, separate and apart from the great seal of the State of Kansas (Section 68-2004, G.S., 1957 Supp.). Having a separate "seal" is a common thing for state departments in Kansas. For example and in addition to the Turnpike Authority and the Kansas State Highway Commission, the State Corporation Commission has its own seal (Section 74-607, G.S., 1949), and the State Forestry Fish and Game Commission has its separate seal (Section 74-3302 C, G.S., 1949). Also, the State Office Building Commission has its separate seal (Section 75-3608 (2), G.S., 1957 Supp.).

All state lands deemed to be necessary for the Kansas Turnpike project are donated by the State of Kansas for that purpose (Section 68-2005, G.S., 1957 Supp.). And it will be noted this is in contrast to the system followed in Ohio (discussed later) where the Ohio Turnpike Commission must purchase state lands from the state. See *Harrison* v. *Ohio Turnpike Commission*, 272 F.2d 337.

All property (real, personal or right-of-way) of the Kansas Turnpike Authority is taken in the name of the State of Kansas (Section 68-2006, G.S., 1957 Supp.).

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In *Flower* v. *California Toll-Bridge Authority,* 128 F.2d 549 (Ninth C.C.A.), it was held that where the toll-bridge would become a part of the state highway system after the bridge was completely paid for by the tolls, that the action was in fact one against the State of California and was thus prohibited by the Eleventh Amendment to the Constitution of the United States (App. A17). Also, the Fifth Circuit, in *K. C. Bridge Co.* v. *Alabama State Bridge Corporation,* 59 F.2d 48 (Cert. denied, 287 U.S. 644), held that an action against the State Bridge Corporation was one against the State. And the Eighth Circuit Court of Appeals, in *Petty* v. *Tennessee-Missouri Bridge Commission,* 254 F.2d 857, held that where the State Bridge Commission had no right to levy taxes but pledged its tolls exclusively for repayment of the bonds, the State Bridge Commission was immune from Federal jurisdiction by reason of the Eleventh Amendment.

Under Section 68-2017, G.S., 1957 Supp., this Kansas Turnpike project is to become a part of the Kansas state highway system under jurisdiction of the State Highway Commission when the turnpike revenue bonds are retired—and at that time the Kansas Highway Commission may collect and receive the revenues. Thus, the more judgments paid at this time out of turnpike revenues, the longer it will be before the State Highway Commission of Kansas receives these revenues into the general highway fund.

Section 68-2025, *et seq.*, G.S., 1957 Supp., provide for the Turnpike being policed by the Kansas State Highway Patrol upon agreement with the State Highway Commission. The Kansas Turnpike Authority may borrow moneys from the state highway fund of the State Highway Commission, but reimbursement must be made out of turnpike toll revenues (Section 68-2033, G.S., 1957 Supp.).

It is a common thing in Kansas to provide for revenue bonds without their payment being guaranteed by the state. Revenue bonds (with no state obligation) are commonly used by various state departments in instrumentalities, *viz.*, the Kansas Turnpike Authority (Section 68-2007, 68-2009, G.S., 1957 Supp.); the State Board of Regents for state university dormitory bonds (Section 76-6 all and Section 76-6a16, G.S., 1949); the State Office Building Commission for construction and equipping of a state office building to house all facets of state government (Section 75-3608, G.S., 1957 Supp.). It is a weak argument to say that because revenue bonds are not a direct obligation of the state, that the state agency and instrumentality issuing them is not a part of the state government. Nothing could be more directly a part of the governmental entity of Kansas than its Board of Regents having jurisdiction over state universities and colleges, or than the State Office Building Commission which built the state building on the capitol grounds for the housing of state government itself.

In *State ex rel.* v. *Board of Regents,* 167 Kan. 587, 207 P.2d 373, the Supreme Court of Kansas held that revenue bonds for dormitories at state universities were not debts of the State of Kansas for the very reason that the law authorizing those bonds so provided. The Court said further:

> "The bonds do not pledge the faith and credit of the state, they do precisely the contrary. The bondholder knows he may look only to the revenue from the buildings for payment. Whether he desires to make such an investment is a matter left entirely to his own discretion and judgment." (l.c. 591).

In *State ex rel.* v. *Kansas Armory Board,* 174 Kan. 369, 256 P.2d 143, the Kansas Supreme Court upheld the statute which created the Armory Board as a state agency with

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power to sue and be sued and authorized it to issue revenue bonds (but not obligations of the state) for construction of National Guard Armories.

The State of Kansas is the principal and real party in interest with respect to the dormitories at its state universities—and with respect to the state office building housing the various facets and departments of state government—and with respect to the Armory Board's jurisdiction over National Guard Armories—and also with respect to the Kansas Turnpike which is a part of the state system of highways. We again submit that merely because all of these bonds in every instance are revenue bonds not guaranteed by the State, that such fact alone can have no bearing upon the question of these various agencies and instrumentalities being "the State" within the meaning of Federal diversity jurisdiction.

In *Hosterman* v. *Kansas Turnpike Authority*, 183 Kan. 590, 331 P.2d 323, the Kansas Supreme Court said:

> "The Kansas Turnpike Authority is an arm and agency of the state, created by the legislature to perform an essential governmental function for the people of the state (l.c. 592) * * *. At no place in the act is there any waiver of the state's immunity from tort liability—rather the waiver extends to and is limited only to the statutory right of action created by the act in G.S., 1955 Supp., Section 68-2015. * * * The turnpike act does not waive the state's immunity from tort liability."

Petitioner contends that if the Kansas Supreme Court did not regard the Kansas Turnpike Authority as "the State of Kansas" it would not be rendering decisions to relieve the Kansas Turnpike Authority from all tort liability because of its possessing state immunity.

The opinion of the Tenth Circuit Court of Appeals (App. A1), says that this Petitioner, the Kansas Turn-

pike Authority, is "a creature of the legislature empowered to perform designated *proprietary* functions." (Italics supplied). However, the Kansas Legislature (Section 68-2003, G.S., 1957 Supp.), says the powers of the Kansas Turnpike Authority *"shall be deemed and held to be the performance of an essential governmental function"* (italics supplied). The Supreme Court made the same statement in *Hosterman* v. *Kansas Turnpike Authority, supra.*

Apparently the Tenth Circuit Court of Appeals, in upholding diversity jurisdiction here, relied exclusively upon *Harrison Construction Company* v. *Ohio Turnpike Commission*, 272 F.2d 337. While Petitioner contends the opinion in that Ohio Turnpike case is not in accord with the basic decisions heretofore made by the United States Supreme Court, it is still quite distinguishable from the facts and circumstances involving the Kansas Turnpike Authority. For example, in the Ohio case (l.c. 339), the Sixth Circuit Court made it quite plain that the Ohio Turnpike Commission must compensate the State of Ohio for any state lands taken. But in Kansas the State must donate any state lands necessary for turnpike construction (last paragraph of Section 68-2005, G.S., 1957 Supp.). Furthermore, the Ohio Supreme Court had not held the Ohio Turnpike Commission to be the alter-ego of the State, as has the Kansas Supreme Court

Also, the Sixth Circuit Court, in the case of *Harrison Construction Company* v. *Ohio Turnpike Commission, supra,* said:

> "This action will not and can not in any way affect the treasury of the State of Ohio (l.c. 340)."

But under the Kansas law the State of Kansas (through the State Highway Commission) takes over and operates and collects and receives the revenue from the turnpike

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fund as soon as the revenue bonds are paid off (Section 68-2017, G.S., 1957 Supp., App. A13). Thus, the earlier the revenue bonds are retired, the sooner these revenues come into and are used by the general state highway fund. Furthermore, under the Kansas law, as distinguish from Ohio, the state highway fund comes from gasoline taxes and is earmarked for highway use and for no other purpose and *is not appropriated by the state legislature* (139 Kan. 391, *supra*). In this respect, the state highway fund coming from gasoline tax and being earmarked for highway uses without appropriation by the legislature, is just like the Kansas Turnpike fund which is earmarked for turnpike use and is not appropriated by the state legislature. The only difference is that the former is held by the State Treasurer pending its use and the latter is held by trustees pending its use—all as determined by the whims of the Kansas Legislature. Under the Kansas law, funds from the revenue bonds of the State Board of Regents issued for the construction of state university dormitories (Section 76-6a16, G.S., 1949, App. A16), are held intact to pay off the bondholders and when those bonds are paid off the state, through its Board of Regents, would receive the revenue into its own fund. The same is true with respect to revenue bonds for the state office building (Section 75-3608, G.S., 1957 Supp., App. A15); and the same is true where the State Armory Board issues revenue bonds with which to construct National Guard Armories (Section 48-318, G.S., 1949, App. A16). Thus, Petitioner contends that it is entirely erroneous to say that merely because revenue bonds issued by any state agency are to be paid from revenues and without obligation of the state that the agency, arm or instrumentality issuing such bonds is engaged in a proprietary function. On the contrary, all such agencies referred to above, including the Kansas Turnpike Authority, are engaged in carrying on essential governmental functions. As

to the Kansas Turnpike Authority and the State Highway Commission, this distinction of governmental function instead of proprietary function is made both by statute and by Kansas Supreme Court decision, as has been indicated above.

II.

Can the Contract Between Contractor-Respondent and This Petitioner Be So Construed As a Matter of Law to Permit the Contractor to Recover from This Petitioner, the Kansas Turnpike Authority, for Reworking and Recompacting a Road Grade Damaged by Climatic Effects Prior to the Authority's Acceptance of the Work When Such Written Acceptance Is Specifically Required by the Contract?

The District Court (Hon. W. W. Ritter, Judge), refused to make any findings of fact and decided as a matter of law (R. 56), that the last four lines of Section 20.42 of the Contract Supplemental Specifications (R. 66), legally determined this lawsuit in favor of the contractor. Those four lines which so intrigued the District Court read as follows:

> "Whenever yielding or soft spots are the result of placing improper material, failure to properly compact the embankment, or to provide for surface drainage, repair shall be at the contractor's expense." (R. 66).

Since this short paragraph quoted above does not include instances where yielding or soft spots (or failure of grade compaction) were caused by action of the elements, the Trial Court (and the Tenth Circuit Court) held that repairs necessitated by reason of action of the elements would *not* be the contractor's expense. Petitioner contends that such ruling might have

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been proper if the above four-lined paragraph was all the contract stated on this subject. However, the Courts, in construing a contract as a matter of law, should look to the entire instrument. Apparently the Courts below completely ignored the following contract provisions:

Special Provision No. 5 (R. 60-61).

> "That grading and drainage performed under this contract will be maintained by the contractor until final acceptance of the work or until paving contractor is ready to commence operations."*

Special Provision 8.2 (R. 62-63).

> "The contractor shall notify the resident engineer in writing of the time the work is ready for final inspection."**

Standard Specification 5.12 (R. 89).

> "*Any* defective work from *any cause* found to exist *prior* to final acceptance shall be removed and replaced in an acceptable manner" (italics supplied).

Standard Specification 5.15 (R. 90).

> "When contractor shall have satisfactorily completed the work in an acceptable manner and final inspection made, the engineer shall give contractor written notice of final acceptance."

Standard Specification 8.9 (R. 91).

> "Contractor is released from further work upon written notice of acceptance of the work by the engineer" (this notice not given until after re-work by contractor).

---

*The recompaction work here involved was done before "final acceptance" and before being turned over to the paving contractor.

**This written notice was not given and there was no final inspection prior to the recompaction work here involved.

Standard Specification 9.2 (R. 92).

> "Contractor accepts compensation under the contract in full payment for loss or damage arising from action of the elements occurring prior to final acceptance."*

Standard Specification 18.20 (R. 93).

> "Contractor is responsible for stability of embankment and shall replace at his own expense any portion which has become displaced due to ordinary rains and climatic effects."**

Petitioner submits that the United States Circuit Court of Appeals for the Tenth Circuit, by affirming the District Court judgment construing this contract as a matter of law, sanctioned a departure by the District Court from the usual and accepted course of judicial procedure. Petitioner further contends and submits that if the entire contract is construed within its four corners, it is impossible to arrive at the decision reached below.

CONCLUSION.

The conflict of the instant decision by the Tenth Circuit Court of Appeals with the applicable decisions of this Court and with those of the Kansas Supreme Court, based upon Kansas statutes, would seem to demonstrate the error committed by the Court below as well as the need for review on

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*There was never a final acceptance here until after re-work was completed.

**The seven inches of rain from September 22 to October 7 were "ordinary" rains. The Tenth Circuit Court attempted to find that such rains were "unusual"—although the District Court refused to make any such finding thereon, and instead decided the case on the legal construction of the contract terms.

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certiorari by this Supreme Court in order to resolve the fundamental variance herein discussed.

The statutes of Kansas and the authorities interpretations thereof established that the Kansas Turnpike Authority is an integral part and instrumentality of the State Government for the purpose of carrying on an essential governmental function—and not separate entity for mere proprietary functions as erroneously suggested by the Tenth Circuit Court of Appeals. The State of Kansas has a direct pecuniary interest in all claims against the Kansas Turnpike Authority. This action, therefore, is barred by the Eleventh Amendment to the Constitution of the United States (App. A17).

For the reasons heretofore stated, the Petitioner respectfully submits that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

January Term, 1960.

THE KANSAS TURNPIKE AUTHORITY,
Appellant,
vs.
EDWIN JOHN ABRAMSON and EMMETT JOHNS, Executors of the Estate of JOHN P. ABRAMSON, deceased,
Appellees.
} Number 6200

(Filed United States Court of Appeals, Tenth Circuit, February 29, 1960. Robert B. Cartwright, Clerk.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

Edward F. Arn (Dale Spiegel and Gale Moss were with him on the brief) for Appellant.

Samual Mellinger for Appellees.

Before Murrah, Chief Judge, Lewis, Circuit Judge, and Wallace, District Judge.

The appellee contractor for the grading and drainage of a segment of the Kansas Turnpike brought this diversity

action against the Turnpike Authority to recover compensation for redoing work which it had already *acceptably* done, but which was required to be redone due to the fault of no one. The construction contract obligated the contractor to construct, according to specifications, a road bed suitable for the paved surface of the turnpike. This work entailed the laying down of successive layers or "lifts" of earth of specified thickness and moisture density until the embankments were brought to specified grade and drainage. Each lift was to be laid, rolled and inspected before another layer was placed on top of it.

The contractor performed his contract in a satisfactory and acceptable manner on certain parts of the contract area, but before final acceptance as provided in the contract, *unusual rains* over a period of two weeks softened the "upper lifts" of the embankment to such an extent that it was necessary to rework and recompact them in order to bring them up to specifications. When the contractor refused to do the work without additional compensation therefor, it was agreed that he would proceed to do it and that both parties would keep an account of it and they would then decide whether compensation was due. After the work was done, the Authority finally denied a claim therefor, and this suit was commenced. There is no question concerning the value of the work performed. Our salient question is whether the contract should be construed to provide compensation therefor. The trial court so construed it and entered judgment for the contractor in an agreed amount.

The first question is one of jurisdiction, *i. e.*, whether the suit is against the state of Kansas, or rather whether the State is a real party in interest. If so, the suit must be dismissed for lack of diversity. The Kansas Legislature created the Turnpike Authority as a body corporate and

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politic, and as a public instrumentality, with powers to construct, operate and maintain turnpike projects, and to issue revenue bonds of the Authority, payable solely from revenue to finance such projects. It is exempt from all taxes or assessments upon any property acquired or used by it, and it is clothed with sovereign immunity except to the extent to which it has expressly been made liable. See *Anderson Cattle Co.* v. *Kansas Turnpike Authority*, 308 P. 2d 172; *State* v. *Kansas Turnpike Authority*, 273 P.2d 198. But it is vested with power to sue and be sued in its own name, and the State of Kansas is in no wise interested in judgments for or against it. It is unlike the Commission in *Highway Commission* v. *Utah Company*, 278 U.S. 194, which was "but the arm or alter ego of the State with no funds or ability to respond in damages." See p. 199. The Authority is not under the supervision of the State or any agency thereof. In sum, it is a public corporation—a creature of the legislature empowered to perform designated *proprietary* functions without any obligation on the part of the State. The State was therefore not a real party in interest, and the requisite diversity of citizenship is present. Cf. *Harrison Construction Co.* v. *Ohio Turnpike Commission*, (6 C.A.—decided Dec. 3, 1959) 272 F.2d 337.

This brings us to a construction of the contract, and it is well to have in mind some governing canons. The generally accepted rule is that "where one agree to do for a fixed sum a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." *United States* v. *Spearin*, 248 U.S. 132, 136; see also *Day* v. *United States*, 245 U.S. 159; *Barnard-Curtis Co.* v. *United States*, 244 F.2d 565; *Smith* v. *Phillips*, 128 F. Supp. 61; *Newcome* v. *Schaeffler*, 279 P.2d 409; Restatement Contracts, Sec. 3467; Williston Rev. Ed., Sec. 1963-64. In the words of the Kansas

court, "When the principal object of the contract is to obtain a result * * * the risk of accomplishing such purpose or result is on the builder." *Glass* v. *Weisner*, 338 P.2d 712, 716. Where, however, the contract provides for the performance of a given undertaking in accordance with prescribed plan and specification, this rule does not apply, because the contractor is not permitted to vary from the prescribed plans and specifications "even if he deems them improper and insufficient; and therefore cannot be held to guarantee that work performed as required by them will be free from defects, or withstand the action of the elements, or accomplish the purpose intended. Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled and he remains liable only for defects resulting from improper workmanship or other fault on his part, unless there be a provision in the contract imposing some other or further obligation." *Frederick* v. *Redwood County*, 190 N.W. 801; also quoted in *McCree & Co.* v. *State*, 91 N.W.2d 713. See also *Schliess* v. *City of Grand Rapids*, 90 N.W. 700. Whether ours is an "end result" contract or a "specified manner and method" one depends of course upon the intention of the parties, to be gathered from its text and context. Construction by classification or categorization is rendered difficult, if not impossible, by the fact that contracts like ours call for an end result according to specifications. And so, in the last analysis, we must look to the contract by the whole of its parts to determine whether the parties actually intended to provide compensation for extra work required to be done through the fault of no one. Or, more specifically, the question is who assumed the unforeseen risk of the elements.

The construction contract incorporated the standard specifications for state road and bridge construction by the

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Kansas State Highway Commission. And, it also incorporated special Kansas Turnpike provisions and supplemental specifications, all of which were made integral parts of the construction contract, with the proviso that in the event of a discrepancy between the standard or general specifications and the supplemental specifications or special provisions, the latter would govern.

Section 5.1 of the general provisions of the contract authorized the project engineer to decide "all questions which may arise as to the interpretation in the plans and specifications, and all questions as to the acceptable fulfillment of the terms of the contract." The appellant first takes the position that authority to decide all questions arising out of the interpretation of the plans and specifications and the fulfillment of the terms of the contract carried with it the power and authority to construe the contract to determine whether it provided for the payment of additional compensation for the work redone and for which claim is made here. The parties were of course free to stipulate that the Authority's engineer, or any one else for that matter, would be the final arbiter of all disputes arising out of the performance of the contract. And see *United States* v. *Gleason,* 175 U.S. 588, 602; *United States* v. *Wunderlich,* 342 U.S. 98. The provision of the contract invoked is under the heading "Control of Work", and in its context seems to make the engineer the sole judge of whether the performance of the contract was in accordance with the plans and specifications and not to delegate to him the power to decide questions of law involving an interpretation of the contract, traditionally left to the courts. Certainly we should not construe the contract to preclude judicial inquiry unless intention to do so was clear and unequivocal. Indeed, the appellant states that the only question for decision is one of law to con-

strue the contract within its four corners, including the various specifications which are integral parts thereof. We do not think the parties intended to commit this legal question to the Authority's engineer. Cf. *United States* v. *Nickel*, 243 F.2d 924.

Coming then to the pertinent provisions of the contract, Section 4.1 of the general specifications recited in material part that it was the intent of the plans and specifications "to provide for the execution and completion in every detail of the work described herein." And, as we shall see, the plans and specifications did provide for every detail of the work to be performed under the contract as well as the method and manner of performing it. Section 7.14 under the topical heading of "Legal Relationships and Responsibilities to the Public", stipulated that the contractor should have charge and care of the work and "shall take every precaution against injury or damage to any part thereof by the action of the elements or from any other cause * * *; and that "The contractor shall rebuild, repair, restore and make good all injuries or damages to any portion of the work occasioned by any of the above causes before final acceptance, and shall bear the expense thereof, except damage to the work due to unforseen causes beyond the control of and without fault or negligence of the contractor, including, but not restricted to, acts of God * * *." There is nothing in this Section of the contract which could be construed as obligating the contractor to make good injuries or damages to the fill or embankment caused solely by the action of the elements without fault or negligence of the contractor. But in Section 9.2, under the heading "Measurement and Payment", the contractor agreed to accept the compensation provided in the contract "in full payment * * * for loss or damage arising from the nature of the work or from action

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of the elements, or from any unforseen difficulties which may be encountered during the prosecution of the work until the final acceptance by the engineer * * *." On their face, these provisions seem contradictory, and so we must look further for conciliation.

Section 18, entitled "Embankments-Construction Methods", provided that "The contractor shall be responsible for the stability of all constructed embankments, and shall replace at his own expense any portion which, in the opinion of the engineer, have become displaced due to carelessness or negligent work on the part of the contractor, or by reason of ordinary rains and climatic effects." The record shown that immediately after the embankment had been brought up to grade and specifications, 7.27 inches of rain fell in this area from September 22 to October 5. No one contends that this amount of rain was ordinary for this time and place.

Under the special provisions, the contractor agreed to maintain the grade and drainage being performed "until final acceptance of the work, or until such time as the paving contractor is ready to commence operations in the areas concerned." In the supplemental specifications and under Section 13.40 entitled "Method of Measurement", the contractor agreed to remove, replace and recompact the embankment material at his own expense where soft or spongy spots are the result of placing improper material in the embankment, or failure to properly compact the material. And finally we come to Section 20.42 of the supplemental specifications providing in detail for "compaction requirements". This section of the contract, which revised the entire sub-article on "Compaction of Earthwork", specifically provided for the blading and rolling of the entire surface of each layer or lift of earth "to insure

that all the fill material is uniformly compacted to the required density"; "in the event any yielding or soft spots were developed under this rolling, it should be repaired and made firm to withstand this rolling before additional lifts are made." The section furthermore specifically provided that "wherever in any stage of construction yielding or soft spots are a result of placing improper material, failure to properly compact the embankment, or to provide for surface drainage, repair shall be at the contractor's expense."

In a colloquy between court and counsel during the trial, counsel for the authority, speaking of the practical construction of the contract, significantly stated that, "There is one thing we do in practice, we apply the paragraph in subject 5 to the subject covered by No. 5. We apply the provisions under paragraph 18 to embankments. We apply the provisions under paragraph 20 to compaction. And in doing that we don't get the ambiguity that Your Honor has seen in this lawsuit."

Judged by the language of the foregoing section on compaction, it would seem, as the trial court reasoned, that the parties did specify not only the manner and method of compacting the embankment, but the conditions under which the contractor would be required to recompact the embankment in the event of failure. And as we have seen, the parties were at pains elsewhere in the contract to particularize the instances and conditions in which the contractor was under a duty to repair, rebuild, replace, restore, or recompact yielding or soft spots which developed in the embankment during the construction and before final inspection. *And in each instance, save one, viz., Section 9.2, the duty to repair or recompact was contingent upon the negligence or fault of the contractor.*

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When the contract is viewed by the whole of its parts, it is certainly susceptible of the construction that the parties did intend to specify the circumstances and conditions under which the contractor would be liable to repair or recompact the embankments. Having thus specified the conditions upon which the contractor shall be required to recompact, it seems permissible to say, as did the trial court, that the plans and specifications, considered as a whole, contemplated that the contractor would be paid for recompacting the embankment which he had constructed according to specifications and which failed through no fault of his. This construction of the contract is consonant with evidence in the record to the effect that the parties on the job construed the contract to provide that if the fill or embankment was properly constructed and inspected by the engineers, and left free draining and soft spots developed, the contractors were to be paid for recomputing the fills and embankment. And it is also consistent with record evidence that this construction of the contract comported with custom and usages in the industry.

Viewed in this light, we certainly cannot say that the trial court's construction of the contract was clearly erroneous, and the judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

EDWIN JOHN ABRAMSON and EMMET JOHNS, Executors of The Estate of JOHN P. ABRAMSON, Deceased, Plaintiffs, vs. THE KANSAS TURNPIKE AUTHORITY, Defendant.	Civil Action No. W-1303.

CONCLUSION OF LAW.

The Court concludes as a matter of law that Contract 5-18-E(1) and its integral parts must be so construed that by its very terms, and particularly Section 20.42 of the Supplemental Specifications thereof, the plaintiffs are entitled to have judgment against defendant for the recompaction work done under said contract.

Willis W. Ritter,
United States District Judge.

Approved:

Beck, Mellinger & Atherton,
By: Samuel Mellinger,
Attorneys for Plaintiff.

Arn, Mullins, Unruh, Timmerman & Kuhn,
By: Edward F. Arn,
Attorneys for Defendant.

Entered May 28, 1959.

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APPENDIX B.

Statutes of Kansas:

68-2002, G.S., 1959 Supp. Turnpike projects. "In order to provide for the construction of modern express highways or super-highways embodying, where feasible and necessary, safety devices, including center division, ample shoulder widths, longsight distances, multiple lanes in each direction and grade separation at intersections with other highways and railroads, and thereby facilitate vehicular traffic, provide better connections between the highway system of Kansas and the highway systems of the adjoining states, remove many of the present handicaps and hazards on the congested highways in the state, and promote the argicultural and industrial development of the state, the Kansas turnpike authority (hereinafter created) is hereby authorized and empowered to construct, maintain, repair and operate turnpike projects (as hereinbefore defined), and to issue revenue bonds of the authority, payable solely from revenues, to finance such projects."

68-2003, G.S., 1959 Supp. "There is hereby created a body politic and corporate to be known as the 'Kansas turnpike authority.' The authority is hereby constituted a public instrumentality and the exercise by the authority of the powers conferred by this act in the construction, operation and maintenance of turnpike projects shall be deemed and held to be the performance of an essential governmental function.

"The Kansas turnpike authority shall consist of seven members. Four members shall be appointed by the governor, who shall serve for terms expiring on July 1, 1954,

July 1, 1955, July 1, 1956, and July 1, 1957, respectively; the term of each such member to be designated by the governor. The fifth member of the authority shall be the state director of highways. The sixth member shall be the chairman of the committee on highways of the senate and the seventh member shall be the chairman of the roads and highways committee of the house."

68-2004, G.S., 1959 Supp. "The authority is hereby authorized and empowered to: * * * (d) sue and be sued in its own name, plead and be impleaded; * * *"

68-2005, G.S., 1959 Supp. (Last paragraph of statute.)

"The state hereby consents to the use of all lands owned by it, including lands lying under water, which are deemed by the authority to be necessary for the construction or operation of any turnpike project."

68-2006, G.S., 1959 Supp. "The authority is hereby authorized and empowered to acquire by purchase, whenever it shall deem such purchase expedient, solely from funds provided under the authority of this act, such lands, structures, property, rights, rights of way, franchises, easements and other interest in lands, including lands lying under water and riparian rights, which are located within the state, as it may deem necessary or convenient for the construction and operation of any project, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to take title thereto in the name of the state."

68-2008, G.S., 1959 Supp. (First sentence of section.) "Revenue bonds issued under the provisions of this act shall not be deemed to constitute a debt of the state or of any political subdivision thereof, or a pledge of the faith

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and credit of the state or of any such political subdivision thereof, but all such bonds shall be payable solely from the funds herein provided therefor from revenues * * *."

68-2013, G.S., 1959 Supp. Exemption from taxation. "The exercise of the powers granted by this act will be in all respects for the benefit of the people of the state, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of turnpike projects by the authority will constitute the performance of essential governmental functions, the authority shall not be required to pay any taxes or assessments upon any turnpike project or any property acquired or used by the authority * * *."

68-2017, G.S., 1959 Supp. "Except as hereinafter provided in this section, when all bonds issued under the provisions of this act in connection with any turnpike project and the interest thereon shall have been paid or a sufficient amount for the payment of all such bonds and the interest thereon to the maturity thereof shall have been set aside in trust for the benefit of the bondholders, such project, if then in good condition and repair, shall become a part of the state highway system and shall thereafter be maintained by the state highway commission. The state highway commission, when such project becomes a part of the state highway system, shall have the same power as vested in the authority by Section 9 (68-2009) of this act to fix, revise, charge and collect tolls for the use of such turnpike project and to contract for the use of any part thereof and to fix the terms, conditions, rents and rates of charges for such use; and such tolls, rents and rates of charges shall be sufficient to provide enough revenue to maintain, repair, operate, regulate and police such turnpike * * *."

68-2025, G.S., 1959 Supp. "The Kansas turnpike authority and the superintendent of the Kansas highway

patrol are hereby authorized to provide by contract or agreement, as provided herein, for the policing of any toll or turnpike constructed and operated as permitted and provided by law. * * *"

68-2033, G.S., 1959 Supp. "The state highway commission and the authority are hereby authorized and empowered to make and enter into any and all contracts and agreements, including (but without limitation) any contract or agreement for the removal or construction of any bridge or other highway facility which they may deem necessary, desirable or incidental to the financing, construction, maintenance, repair or operation of any turnpike project financed under the provisions of this act * * *.

"* * * Any such contract or agreement shall provide for reimbursement by the authority, from tolls or other revenues of such turnpike projects, to the commission for the credit of the state highway fund, at any time or times and under such terms and conditions as may be set forth therein, of any amounts previously paid to the authority by the commission pursuant to the provisions of this paragraph * * *."

74-2001, G.S. 1949. "That there is hereby created a State Highway Commission which shall be a body corporate with powers to sue and be sued. Such highway commission shall consist of six members to be appointed by the governor. * * *"

74-2002, G.S. 1949. "* * * It (state highway commission) shall keep a common seal of such design as the commission shall determine. * * *"

74-607, G.S. 1949. "Said corporation commission shall keep an accurate record of all its official acts, and shall also provide a seal. All processes or certificates issued or

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given by said commission shall be attested by its seal. Copies of the record of the commission, certified by the secretary and attested by the seal of the commission, shall be received in evidence with like effect as copies of other public records."

74-3302c, G.S. 1949. "The director of the Forestry, Fish and Game Commission shall keep a seal of office, which shall be used to authenticate all papers and documents issued and executed by him as such officer."

75-3601, G.S., 1959 Supp. "There is hereby created a State Office Building Commission which shall consist of seven members to be appointed by the governor."

75-3608, G.S., 1959 Supp. State Office Building Commission; Powers: (2) "The power and capacity of suing and being sued, of contracting and being contracted with, of making and using a common seal and altering it at pleasure; and shall in its name, as a body corporate and public, and an instrumentality of the state of Kansas, perform the duties and functions hereinbefore and hereinafter specified, and in furtherance thereof have and exercise the powers conferred on it by law, and such other powers as may be incidental in connection therewith.

"(8) The power to borrow money, make and issue negotiable notes, bonds, warrants and other evidences of indebtedness or obligations (hereinafter called 'bonds') in the name of the state of Kansas and to secure the payment of such bonds or any part thereof by pledge or deed of trust of all or any of its revenues, rentals and receipts; and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds whether issued or to be issued, as the commission shall deem advisable; and in general to provide for the security for said bonds and the rights of the holders

thereof; Provided, That the total amount of bonds issued under the authority conferred by this section and any other sections of this act shall not exceed seven million five hundred thousand dollars ($7,500,000).

"(12) The power to do all things and acts necessary or convenient to carry out the powers granted to it by this act or any other act: Provided, that the commission shall have not any time, or in any manner, to pledge the credit or taxing power of the state, nor shall any of the bonds or other obligations issued hereunder be deemed to be an indebtedness or debt of the state of Kansas within the meaning of section 6 of article 11 of the Constitution of the state of Kansas."

76-6a11, G.S. 1949. "Nothing contained in this act shall authorize or empower the Board (State Board of Regents) to incur any indebtedness against said Board, or any of the institutions under its control, or against the state of Kansas, and the entire obligation of said Board shall be limited to the charging and collecting the fees and charges as provided by Sections 4 and 5 of this act and to the application of the fees and charges so collected in the manner prescribed by Section 6 of this act."

76-6a16, G.S. 1949. "Revenue bonds issued hereunder shall not be an indebtedness of the state of Kansas or of the Board of Regents or of the individual members of said Board and shall not constitute an indebtedness within the meaning of any constitutional or statutory limitation upon the incurring of indebtedness."

48-318, G.S. 1949. "Under no circumstances shall any security issued under the provisions of this act (Kansas Armory Board) be or become an obligation or indebtedness of the state of Kansas or of any political subdivision or municipality thereof, nor shall any such security be or

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become an indebtedness of the Board within the purview of any constitutional limitation or provision, and it shall be plainly stated on the face of each such security (National Guard Armory bonds) that it does not constitute such an indebtedness or obligation but is payable solely from the rents, issues and profits as aforesaid." (Parentheses supplied).

Federal Statutes:

Section 1332 of Title 28, United States Code, as amended. "Diversity of citizenship; amount in controversy; costs.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States; * * *"

Constitution of the United States:

The Eleventh Amendment to the Constitution of the United States:

"Amendment 11.—SUITS AGAINST STATES

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."